No. [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GISSEL PACKING COMPANY, INC. ET AL.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HECK'S, INC.

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v.

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GENERAL STEEL PRODUCTS, INC. AND CROWN FLEX OF NORTH CAROLINA, INC.

BRIEF OF GENERAL STEEL PRODUCTS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

The "Question Presented" as stated in the Petition for Certiorari does not fairly embody the position of the Court of Appeals for the Fourth Circuit.

These cases in which Writ of Certiorari is sought are all Per Curiam decisions. (App. A, p. 1a; App. D, p. 77a; App. G, p. 163a) The rationale of the Court of Appeals for the Fourth Circuit can only be discovered by turning to the antecedent decisions on which these cases are based. They are: *NLRB v. S. S. Logan Packing Co.*, 4 Cir., 386 F. 2d 562; *Crawford Mfg. Co. v. NLRB*, 4 Cir., 386 F. 2d 387, cert. denied 36 LW 3404, ... U. S. ..... ; *NLRB v. Sehon*

Stevenson Co. Inc., 4 Cir., 386 F. 2d 551. This Court denied certiorari in the *Crawford* case; no Petition for Certiorari was filed in the *Logan* case; and the Court of Appeals for the Fourth Circuit enforced the Board's order to bargain in *Sehon Stevenson.*

The question posed by the Petition for Certiorari implies that the Court of Appeals has held that an employer can *never* be required to bargain with a union unless it has won an election, "irrespective" of unfair labor practices of the employer. This is not so. The Court of Appeals has properly held in these antecedent cases that an election is the preferred method selected by Congress for determining questions of representation; but that Court has further said that recognition and bargaining can be required without an election: (1) where no bona fide question of majority representation exists (*Sehon Stevenson* case) or (2) where the employer's misconduct is so extensive and pervasive as to prevent the conduct of a valid secret election. (See *Logan* case and the present decisions.)

THE PRESENT CASES — RATIONALE

In the present cases what the Court of Appeals has held is that on this evidence a question of representation exists, which the parties are entitled to have resolved by election, as required by Sec. 9 (c) of the Act, and not by a dubious card count, and further held that employer misconduct found by the Board is not so pervasive as to prevent the conduct of a valid election.

It may be noted that the Board has made no finding, and is not now contending that valid secret ballot elections could not be held in these cases. What the Board's position really amounts to is that the Board "prefers" a card count over an election in cases where it finds any employer unfair

labor practices. This was not the preference of Congress as expressed in Sec. 9 (c) and reemphasized when the power of the Board to determine representation by other "suitable means" was eliminated from this section by the Taft-Hartley Act (NLRB Sec. 9 c, 29 U.S.C. Sec. 159 c). The Board acknowledged that its authority had been so curtailed in its Annual Report for 1948:

> "Section 9 (c) of the Act, as amended, prescribes the election by secret ballot as the sole method of resolving a question concerning representation, and leaves the Board without the discretion it formerly possessed - but rarely exercised - to utilize other "suitable means" of ascertaining representatives."

Notwithstanding this change, the Board has increasingly sought to require recognition and bargaining without an election, or after the union had lost an election (as in the *General Steel* case), based upon some finding that the employer lacked a "good faith doubt" of the union's majority. This rule has been generally ascribed by the Board as growing out of language of this Court in *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U. S. 62, 69, 100 L. Ed 941, 947, 76 S. Ct. 559:

> ". . . In the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated Sec. 8 (a) (5) of the Act."

This case does not support, and we submit was never meant to support, the structure which the Board has sought to erect upon it. In *Arkansas Oak Flooring* there had been no election; the union possessed cards from 174 of 225 employees *stipulated* to be validly signed by the employees involved.

There was indeed no question about representation. It was a "preemption" case. The holding of the Supreme Court (which is off-point as far as the present case is concerned) was that the dispute fell within the National Labor Relations Act notwithstanding failure of the union to file non-communist affidavits, since there was no need for an election; and therefore that a state court could not intervene by an injunction against peaceful picketing.

The Act speaks in terms of "a question of representation," and this Court in the *Arkansas Oak Flooring* case spoke of bona fide dispute "*as to the existence of the required majority.*" The Board, however, in building upon the case, has changed the nature of the inquiry and now exhibits little interest in whether there is an *actual question* concerning the adherence of the *employees* to the union. Instead, it is interested in the general attitude and conduct of the *employer,* and if it finds unfair labor practices on his part, *however unrelated logically to the union's standing among the employees, or to the employer's knowledge of it*; the Board concludes, and concluded in the *General Steel* case, that the employer was acting generally in bad faith and therefore must have "known" (non sequiter) that the union had a majority all along. This is the holding which the Court of Appeals refused to sustain. The present Petition for Certiorari acknowledges that this is precisely the Board's approach (Petition p. 10):

> "In each case the Board based its conclusion that the Company did not have a good faith doubt as to the Union's majority status on the fact that the Company had committed substantial unfair labor practices during its anti-union campaign."

Surely this is nonsense, for an employer who is convinced that a union has not achieved majority may be just as in-

terested in dissuading his employees, as one who is convinced that the union has full support. *NLRB v. River Togs, Inc.*, 2 Cir., 382 F. 2d 198, 65 LRRM 2987; *NLRB v. James Thompson & Co.*, 2 Cir., per Judge L. Hand, 208 F. 2d 743 at 746, 33 LRRM 2205; *Montgomery Ward & Co. v. NLRB*, 6 Cir., 377 F. 2d 452, 65 LRRM 2285; *NLRB v. Ben Duthler, Inc.*, 6 Cir., ... F. 2d ....., 68 LRRM 2325; *NLRB v. S. S. Logan Packing Co.*, 4 Cir., 386 F. 2d 562, 62 LRRM 2596.

Noteworthy too, along with failure of the Board to conduct an election or to make any finding that a valid election could not be conducted, is the Board's further failure to resort to an injunction proceeding as authorized by Congress in Section 10 (j) of the Act. If indeed there were unfair labor practices such as to frustrate a fair election, Congress has provided a remedy for controlling such situations, for restoring a proper atmosphere under which an election could be held. Again the Board prefers not to use the procedure laid down by Congress.

The Court of Appeals has held in its decision in *Sehon Stevenson*, 4 Cir., 386 F. 2d 551, that where the union's majority support is undisputed, the employer must recognize it without an election. This is in accord with the decision of the Supreme Court in *Arkansas Oak Flooring* and not at variance with it. Where there is a genuine dispute, however, and the union's claim rests only on cards solicited by it, we submit the *employees* are entitled to an opportunity for a secret vote, and the *employer* is likewise entitled to the results of such a ballot. *NLRB v. River Togs, Inc.*, 2 Cir., 382 F. 2d 198, 65 LRRM 2987; *NLRB v. Flomatic Corp.*, 2 Cir., 347 F. 2d 74, 59 LRRM 2535; *NLRB v. S. S. Logan Packing Co.*, 4 Cir., 386 F. 2d 562, 62 LRRM 2596; *NLRB v. Ben Duthler, Inc.*, 6 Cir., ... F. 2d ....., 68 LRRM

2324; *Montgomery Ward & Co. v. NLRB*, 6 Cir., 377 F. 2d 452, 65 LRRM 2285.

THE GENERAL STEEL CASE

REASONS FOR DENYING CERTIORARI

In *General Steel* the union lost a secret ballot election by a vote of 94 to 85 (App. I, p. 172a). The election was set aside, but no new election has ever been held or called for.

In this case no one was discriminatorily discharged; there was no violation of Sec. 8 (a) (3) charged against the Company. Solely on the basis of alleged coercion of employees, the Board rests its conclusion that this employer should now be compelled to recognize the union, contrary to the election result.

The union had demanded recognition by *General Steel* at the time it filed its petition for election, claiming support of a majority of employees, but it never at any time offered an examination of its cards by the employer or by an impartial third person. Indeed the union had assured the employees that their cards would be kept *secret*, except for submitting them to the Labor Board to secure an election. The union wrote a letter to the employees repeatedly assuring them of the secrecy of the cards (General Steel Joint Appendix p. 76, Trial Examiners Exhibit 2):

> "Your Petition for a Secret Ballot Election has been filed. Your secret cards have been turned over to the Federal Government . . . "
>
> * * *
>
> "During the next few weeks while you are awaiting your secret vote election, . . . "
>
> * * *
>
> "Your signed, secret card and your "X" Yes

on a Government Secret Ballot is your democratic way . . . "

* * *

"An overwhelming majority has already signed Secret Authorization Cards."

It is strange that this letter, admitted as a Trial Examiner's Exhibit (Joint Appendix pp. 76, 112), was never dealt with in the Decision of the Trial Examiner or the Board.

In this veil of secrecy, and faced with the union's demand for recognition, *General Steel* endeavored to learn the truth about the union's claim by making inquiry among the employees (General Steel Joint App. p. 429 et seq.). The Trial Examiner agreed that the employer had the right to do this. (General Steel Joint Appendix p. 434). See *NLRB v. Lorben Corp.*, 2 Cir., 345 F. 2d 346, 59 LRRM 2184; *NLRB v. Trumbull Asphalt Co.*, 8 Cir., 327 F. 2d 841, 55 LRRM 2435; *Kay Allen Classics, Inc.*, 152 NLRB No. 134, 59 LRRM 1308; *Sagamore Shirt Co.*, 153 NLRB No. 27, 59 LRRM 1474.

The result of this inquiry was that the Company concluded that only about 30 percent of employees favored the union at that time. (General Steel Joint App. p. 431) and that there was no majority for the union. The outcome of the secret ballot election vindicated the Company. But all of this was swept aside by the Labor Board under the general cloud of the employer's supposed "bad faith," and the Board issued its order to bargain notwithstanding the expressed desires of the employees in a secret ballot election.

Certiorari should be denied in *General Steel* regardless of the rationale under which it was decided by the Court of Appeals. We submit that this Board decision could not have been sustained in any Circuit. Even if one assumes the valid-

ity of the "card check" approach, the Board here counted as "votes" for the union a majority of the cards which should have been rejected under numerous decisions. The Trial Examiner's Decision, as adopted by the Board, accepts 97 out of a total of 120 cards counted for the union upon the following basis. (App. I, pp. 193a-194a):

> "Accordingly, I reject Respondent's contention 'that if a man is told that his card will be secret, or will be shown only to the Labor Board for the purpose of obtaining election, that *this* is the *absolute equivalent* of telling him that it will be used "only" for purposes of obtaining an election.' "
>
> * * *
>
> "With respect to the 97 employees named in the attached Appendix B, Respondent in its brief contends, in substance, that their cards should be rejected because each of these employees was told one or more of the following: (1) that the card would be used to get an election (2) that he had the right to vote either way, even though he signed the card (3) that the card would be kept secret and not shown to anybody except to the Board in order to get an election. *For reasons heretofore explicated, I conclude that these statements, singly or jointly, do not foreclose use of the cards for the purpose designated on their face.*" (Emphasis added)

Thus the Trial Examiner ruled that even though a man was told *all* of these things: that his card would be used to obtain an election, that it would otherwise remain secret and be shown to nobody but the Labor Board in connection with obtaining an election, and that notwithstanding signing the

card he would remain uncommitted and free to vote either way - that still such cards may be counted as votes for the union. A majority of the cards in this case were counted under this ruling. We think this was clear error under any rational approach. See *Bauer Welding & Metal Fabricators v. NLRB*, 8 Cir., 358 F. 2d 766, 62 LRRM 2022; *Phelps-Dodge Corp. v. NLRB*, 7 Cir., 354 F. 2d 591, 60 LRRM 2550; *NLRB v. Koehler*, 7 Cir., 328 F. 2d 770, 55 LRRM 2570; *NLRB v. Winn-Dixie Stores, Inc.*, 6 Cir., 341 F. 2d 750, 58 LRRM 2475; *NLRB v. Lake Butler Apparel Co.*, 5 Cir., 392 F. 2d 76, 67 LRRM 2882; *NLRB c. Southland Paint Co.*, 5 Cir., ... F. 2d ....., 68 LRRM 2169; *Englewood Lumber Co.*, 130 NLRB 394, 47 LRRM 1304; *Morris and Associates*, 138 NLRB No. 126, 51 LRRM 1183.

We submit that *General Steel* is not a proper vehicle for testing the question which the Labor Board is now propounding for decision by this Court.

We further submit that these decisions of the Court of Appeals for the Fourth Circuit are correct and that the Labor Board's *Bernel Foam* doctrine (146 NLRB 1277, 56 LRRM 1039) is wrong as applied in cases such as *General Steel*; that this doctrine springs not from the desire of the Board to dispose of cases where no question concerning representation exists, but from its eagerness to resolve doubtful questions of representation in favor of a union regardless of the desires of the employees involved. We suggest that this is an intrusion into the broad field of labor policy which is beyond the proper function of the Board. *American Shipbuilding Co. v. NLRB*, 380 U. S. 300, 318-19, 13 L. Ed. 2d 855, 867, 85 S. Ct. 955.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Lewis P. Hamlin, Jr.
Wachovia Building
Salisbury, North Carolina
Attorney for General Steel Products, Inc.

OF COUNSEL:
Shuford, Kluttz and Hamlin
Wachovia Building
Salisbury, North Carolina